In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1290

MICHAEL J. SCANDIFIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1968. A petition for rehearing was denied on March 5, 1968. The petition for a writ of certiorari was filed on April 4, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to sustain the conviction.

298-561—68

2. Whether there was plain error in the instructions.

3. Whether evidentiary rulings by the trial court were proper.

4. Whether petitioner was denied a speedy trial because of the lapse of time between the offense and the return of the indictment.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York on nine counts of an indictment charging him with wilfully causing the interstate transportation of counterfeit securities in violation of 18 U.S.C. 2314. He was sentenced to concurrent terms of six years' imprisonment on each count. The court of appeals affirmed the conviction.

The evidence is summarized in the opinion of the court of appeals. It shows that the offenses arose out of a scheme whereby petitioner induced various persons, principally investors in the Hersch Trading Company, to pledge petitioner's counterfeit Shell Union Oil bonds, for short terms loans. The sequence of events began in October 1960, when Leon Hersch and Irving Cohen, two of the partners in the Trading Company, were pressed by investors to obtain repayments from Morton Rosenberg, the third partner (R. 6–13). Hersch hired petitioner to collect what Rosenberg owed (R. 14). When petitioner's effort to collect money from Rosenberg proved fruitless, petitioner, at a meeting of the investors at Hersch's New Jersey home, displayed the Shell bonds and suggested that he had another

way for them to get a return (R. 14–15, 348–350, 474–476, 500). Subsequently, at a New York restaurant, petitioner revealed his plan to Hersch. Petitioner said that the investors could use the bonds to obtain loans, providing they returned to petitioner 60 percent of the face value of the bonds. Petitioner said that the loans could be repaid in six months when he collected from Rosenberg. After Hersch took two of the bonds to a nearby bank and found them acceptable as collateral, he agreed to participate in the plan (R. 15–18).

On November 9, Hersch secured some Shell bonds from petitioner at the latter's Brooklyn garage and delivered them to an investor who used them as collateral for a loan at a Brooklyn bank (R. 19–20). Thereafter during November, petitioner, in Brooklyn, gave Hersch additional bonds for distribution to Aaron Starr, Leonard Ledwitz and Sam Serkin, investors who lived in New Jersey. Two of these investors had previously met petitioner at Hersch's home. Starr and Ledwitz then used these bonds as collateral to obtain loans from banks (R. 25–34). When Serkin was unable to negotiate a satisfactory loan, the bonds delivered to him were used by Solomon Rabstein to obtain a loan (R. 35–40). On November 25, Rabstein took 100 of the bonds to the printer of the genuine bonds and discovered they were false (R. 41–42). When Rabstein threatened to go to the police, petitioner gave back his share of the Rabstein loan so that the bonds which the latter had pledged could be redeemed. After Hersch secured possession of these bonds, petitioner told him to come to

New York and return the bonds to him (R. 43–49). On November 30, Ledwitz returned 32 bonds to petitioner at a meeting of investors at Hersch's home. Upon leaving, petitioner said he was going to New York to communicate with the people who gave him the bonds (R. 50–57, 207, 360–365). In the course of these transactions, Hersch transported bonds from New York to New Jersey, and he and some of the investors also transported bonds back to New York.[1] In all, counterfeit bonds having a face value of $410,000 were pledged and petitioner received over $168,000 as his share of the loans obtained (Pet. App. A5).

ARGUMENT

1. The claim that the evidence was insufficient to show that petitioner caused the interstate transportation of counterfeit bonds is refuted by the record. As the court of appeals pointed out with reference to count ten, there was evidence that petitioner specifically told Hersch to come to New York and give him the bonds which Rabstein had redeemed from the New Jersey bank after discovering that they were counterfeit (R. 49). As to count eleven, evidence that petitioner left the New Jersey meeting on November 30, 1960, with bonds in his possession, after stating that he was going to New York to contact the people who gave him the bonds (R. 56–57, 207, 364–365), warranted an inference that petitioner himself transported these bonds in interstate commerce. As to the

[1] Other counterfeit bonds were pledged and distributed to other investors by Hersch's partner, Irving Cohen (*e.g.*, R. 170–172, 180–185).

other counts, when petitioner gave the bonds to Hersch, a New Jersey resident, to deliver to other New Jersey residents, he could reasonably have foreseen that the bonds would be taken across state lines. See *Pereira* v. *United States,* 347 U.S. 1, 8–9. Since petitioner received a concurrent sentence on all of the counts, the judgment was properly affirmed if the evidence was sufficient to support the conviction on any count. *Lawn* v. *United States,* 355 U.S. 339, 362.

The district court had charged, in accordance with prior rulings by the Second Circuit,[2] that the jury could find that petitioner caused the interstate transportation of the bonds if he turned them over to Hersch "without limitation as to where they were to be transported, and if in fact thereafter the bonds were transported in interstate commerce" (R. 796). Petitioner did not object to these instructions. The opinion below has narrowed the concept of causation to reasonable foreseeability. Since, however, the evidence that the jury necessarily must have credited showed that petitioner, in dealing with a group of New Jersey investors, could reasonably foresee the transportation of the bonds and did in fact participate in the interstate transportation of some, the court below properly declined to reverse the conviction.

2. It was not error for the court to fail to give a cautionary instruction on accomplice testimony. Even if Hersch and Cohen may properly be characterized as accomplices, the government's case did not rest

---

[2] See *United States* v. *Tannuzzo,* 174 F. 2d 177 (C.A. 2), certiorari denied, 338 U.S. 815.

upon their testimony. There was amply corroborating testimony from other witnesses, such as Rabstein from whom petitioner forcibly retrieved 100 bonds after Rabstein discovered that the bonds were spurious (R. 547–550). In these circumstances, the claim of prejudice has no substance. See *Barnes* v. *United States,* 347 F. 2d 925, 927–928 (C.A. 8).

3. (a). Defense counsel, in cross-examining Cohen, brought out the fact that on December 20, 1960, Cohen had informed the F.B.I. that he had obtained the bonds from a "Mr. Schweikert" and that Schweikert was not petitioner (R. 222–231). On redirect examination, Cohen explained that he had falsely named this source because his family had received threatening telephone calls and because of "fear of my family's life knowing Mr. Scandifia's background" (R. 236–238). The trial judge properly permitted the witness to explain his prior inconsistent statement that petitioner was not the source of the bonds. The judge properly dealt with reference to petitioner's "background" by the prompt instruction to disregard this portion of the testimony of the witness.

(b). Petitioner in his own defense denied that he had ever had possession of the counterfeit bonds or anything to do with the bonds (R. 624–627). On cross-examination, the prosecutor asked petitioner whether he had given 100 counterfeit IT&T bonds to a Mr. Ezrine. Petitioner replied "Was I convicted? Was it proven yet?" The court, thereafter, denied petitioner's request for a mistrial but told the jury to disregard the question, instructing them that questions of counsel were not evidence (R. 667–668). Again, the court's

action in denying a mistrial was a proper exercise of its discretion. Petitioner's testimony that he had never had any dealings in the bonds may have opened the door to the prosecutor's question. In any event, there is no occasion for further review of the court's discretion in denying a mistrial and instructing the jury not to consider this question.

4. There is no legal basis for the contention that petitioner was denied a speedy trial because of a lapse of time between the commission of the offense and the return of the indictment, a period governed by the statute of limitations. See *United States* v. *Simmons,* 338 F. 2d 804, 806 (C.A. 2), certiorari denied, 380 U.S. 983. Moreover, this contention was not raised in either the district court or the court of appeals and is, therefore, not reviewable in the absence of exceptional circumstances. See *Lawn* v. *United States,* 355 U.S. 339, 362, n. 16. There is nothing in this record either to show such circumstances or to support the claim that evidence might have become unavailable by the passage of time.

For the reasons stated above, we believe that the petition for a writ of certiorari presents no question warranting review by this Court. We have the duty, however, to advise the Court that on one occasion, after this offense had been consummated but before indictment, petitioner was overheard by an electronic device installed by trespass in a commercial establishment owned by another, talking about a matter totally unrelated to the instant case. We propose to make a disclosure to the district court in accordance with the

procedure which this Court prescribes in *Kolod* v. *United States*, No. 133, this Term, pending on the government's motion to modify. In view of the utter irrelevancy of this single overhearing, we suggest that, in order not to delay the final disposition of this case, it would be appropriate for the Court to rule on the certiorari petition on the basis of the questions raised rather than to grant the petition on the basis of the overhearing. A ruling denying certiorari would be without prejudice to further proceedings in light of this Court's decision in *Kolod* v. *United States*.[3]

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

MAY 1968.

[3] A remand is, of course, unnecessary to confer jurisdiction upon the district court. Since the evidence of the electronic surveillance is newly discovered, the district court could grant a new trial if it found that there were any grounds therefor. Rule 33, F. Rules Crim. Proc.

U.S. GOVERNMENT PRINTING OFFICE: 1968